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No. _____

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF OKLAHOMA, ex rel.
THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

W.A. Drew Edmondson
Attorney General

James Robert Johnson
Assistant Attorney General
Counsel of Record

John K. Lindsey
General Counsel
Department of Public Safety

Douglas F. Price
Assistant Attorney General
Office of the Attorney General
4545 North Lincoln Blvd.
Room 260
Oklahoma City, Oklahoma 73105
405/521-4274

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The Driver's Privacy Protection Act of 1994 (the "DPPA") is a federal statute which directs States when they may, may not, and must disclose certain "personal information" from their motor vehicle records. In the face of a request for information from these records, the DPPA generally requires State employees to discern whether the information sought is "personal information" as defined by the DPPA, and then, whether they may, may not, or must satisfy the request under the detailed federal scheme. The State of Oklahoma challenged the DPPA as a violation of the Tenth Amendment because (a) it requires States to administer a federally-created information disclosure scheme and (b) the scheme applies exclusively to records developed and maintained by States without imposing similar requirements on federal and private sector sources of "personal information." The District Court agreed with the State of Oklahoma and struck down the DPPA as a violation of the Tenth Amendment. The Tenth Circuit, however, did not agree and reversed.

The question presented is:

Does the Driver's Privacy Protection Act violate the Tenth Amendment to the United States Constitution?

LIST OF PARTIES

Actual parties to the proceedings in the Court of Appeals were:

The State of Oklahoma, ex rel. the Oklahoma Department of Public Safety,

Petitioner herein.

The United States of America,

Respondent herein.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Oklahoma, ex rel. the Oklahoma Department of Public Safety ("Oklahoma"), respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 3, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 161 F.3d 1266 (10th Cir. 1998). (Pet. App. 1) The Tenth Circuit's denial of the Petition for Rehearing With Suggestion for Rehearing En Banc was issued on February 2, 1999 and is reprinted in the Appendix to this Petition. (Pet. App. 33) The opinion of the United States District Court for the Western District of Oklahoma is reported at 994 F. Supp. 1358 (W.D. Okla. 1997). (Pet. App. 17)

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 3, 1998. Oklahoma filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc, which was denied by Order dated February 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Driver's Privacy Protection Act is reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

A. Background and Facts

The enactment of the Drivers Privacy Protection Act (the "DPPA") undid, in one blow, the ability of the State of Oklahoma (the "State") to protect and uphold the rights of residents of this State to have access to public records of the State. The State acts upon its constitutional mandate in which residents of the State of Oklahoma maintain primary political authority. Okla. Const. Art. II, Sec. 1. The State Legislature has broad authority to legislate for the public health, safety and welfare. Okla. Const. Art. V, Sec. 36. Under the police powers of the State, the Oklahoma Legislature has enacted comprehensive legislation regulating the issuance, restriction and revocation of drivers' licenses, and the related public records thereunder. 47 O.S.1991 and Supp.1997, Sec. 1-101, et seq.

In furtherance of this constitutional framework, the State maintains a strong policy favoring the public's right of access to state records. The Oklahoma Open Records

Act mandates that public bodies in Oklahoma provide access to public records upon request and places the burden upon public bodies to show specific authority to maintain confidentiality before access can be denied. 51 O.S.1991 and Supp.1997, Sec. 24A.1, et seq. See, 51 O.S.Supp.1997, Sec. 24A.2. The Department of Public Safety must comply with the Open Records Act because it is a public body under the Open Records Act. 51 O.S.Supp.1997, Sec. 24A.3.

State policy requires the Oklahoma Department of Public Safety to provide access to and copies of drivers' license records of its licensees. 47 O.S.Supp.1997, Sec. 6-117.[1] The testimony of the Department of Public Safety introduced at the hearing below was not contested by the United States. The District Court noted that these records include certain information covered by and prohibited from disclosure by the Driver's Privacy Protection Act. (Pet App. 21-22) The United States has asserted that the basis for the enactment of the DPPA, in part at least, was the prevention of stalking by the closure of State drivers' records. The DPPA places broad prohibitions against disclosure of drivers' records of the State, but grants myriad exceptions to the prohibitions, some permissive and some mandatory. 18 U.S.C. Sec. 2721(b). The United States asserted that the DPPA creates only a "permissible directive" and that the DPPA does not conscript states. It fails to explain, however, why the State, a State agency and State employees have any choice but to comply with the

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[1] Likewise, the State has enacted criminal sanctions to prevent stalking, the asserted purpose of the DPPA. 21 O.S.Supp.1999, Sec. 1173.

DPPA when they are subject to civil and criminal penalties for failure to comply. 18 U.S.C. Sec. 2723, 2724. There is no indication in the record that States, any more than the federal government itself, created the problems considered by Congress in enacting the DPPA or that the DPPA will resolve to any extent the dangers posed by stalkers.

B. The Decision of the District Court

The decision of the District Court, which was markedly similar to the decision of the Fourth Circuit in *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), was based on the court's determination of the applicability of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S.Ct. 2365 (1997), which the court recognized prohibited Congress from requiring States to administer or implement federal programs. (Pet. App. 27) The court determined that the DPPA improperly commandeered the State of Oklahoma to administer the federal program created by the DPPA. The Court rejected the argument of the United States that *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), *South Carolina v. Baker*, 485 U.S. 505 (1988) and *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), allowed Congress to require compliance by the State even though the law was not of general applicability.[2]

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[2] The United States raised no issue as to the Fourteenth Amendment in the District Court, relegating the matter to one cursory footnote.

The court determined the DPPA was, "like the statutory provision at issue in *New York*, 'a simple command to state governments to implement legislation enacted by Congress.' " (Pet. App. 27) As the court noted, "[t]he options given to States under the DPPA are not truly options." (Pet. App. 27) The court determined that the DPPA requires States to create and maintain systems to enforce the federal law of non-disclosure. (Pet. App. 29) In short, the DPPA "seeks to treat the Oklahoma Department of Public Safety as a subdivision of the United States." (Pet. App. 29)

C. The Decision of the Tenth Circuit

The Tenth Circuit Court of Appeals reversed and rejected the State's argument that the DPPA improperly commandeers the State. The Court asserted that the DPPA does not require States to legislate, nor, according to the Court of Appeals, does the DPPA conscript State officials to enforce the law. The Court of Appeals noted requirements of the DPPA for States to administer it, saying, "[t]he Supreme Court has never suggested that the Tenth Amendment bars Congress from regulating state conduct merely because states are the only actors engaged in certain activity." (Pet. App. 12) While the Court of Appeals was "cognizant of the Supreme Court's 'trend' established by *New York* and *Printz* of striking down federal legislation which 'commandeers' state legislative and administrative processes, the Court has yet to hold that a federal law, which directly regulates state activity and necessitates some legislative or

administrative action to achieve compliance, amounts to unconstitutional 'commandeering.' " (Pet. App. 15)

The Court of Appeals likewise rejected the determination of the District Court that *New York* and *Printz* established the controlling principle. Instead, the Court of Appeals ruled that *Garcia*, *E.E.O.C. v. Wyoming*, and *South Carolina v. Baker* do not require that laws be of general applicability before they may be imposed upon the States. (Pet. App. 12) Rather, the Court of Appeals stated that the idea of laws of general applicability, although providing a "logical distinction" between the *New York* line of cases and the *Garcia* line of cases, was not a factor that ultimately mattered.

REASONS FOR GRANTING THE WRIT

As the Court of Appeals for the Tenth Circuit recognized, its decision was in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998). This division of authorities deepened with the April 6, 1999, decision of the Eleventh Circuit finding the DPPA unconstitutional, in *Pryor v. Reno*, ___ F.3d ___ (11th Cir. 1999). (Pet. App. 35)

Additionally, this case is of great national importance. The decision of the Tenth Circuit Court of Appeals is contrary to the expressions of this Court in *Printz* and *New York* regarding laws aimed directly and exclusively at the States. Congress may not conscript States and State officers except where laws are of general applicability. This limitation applies regardless of whether such laws

are otherwise valid exercises of Congress' commerce powers. The importance of the States' sovereignty and political accountability demands that Congress be limited in regulating States as States, and this Court has so ruled. In circumstances such as involve the DPPA, the Constitution does not contemplate the direct and exclusive regulation of the State, an agency of the State, and State employees, nor the usurpation of the State as a functionary of the federal government. The resolution of the question presented in this case is of importance to all States.

This case, among the several on this matter, presents a particularly appropriate vehicle for review by this Court. Oklahoma law regarding openness of its records represents the majority view as regards public access to State records. Further, this case presents a vehicle for Supreme Court review that demonstrates the policy interests of a majority of the States, unlike the context of the petition in *Condon*.

I. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE FOURTH AND ELEVENTH CIRCUIT COURTS OF APPEALS

While the issue presented in this petition is the same as the issue raised in *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), this case presents a better vehicle for review. The Fourth Circuit correctly recognized the controlling authority expressed by this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S. Ct. 2365 (1997), and ruled the DPPA violates the Tenth

Amendment, so the Fourth Circuit's decision is due to be affirmed. In contrast, the Tenth Circuit departed from this Court's controlling precedent, so its decision should be reversed.

On April 6, 1999, the Eleventh Circuit ruled the DPPA violates the Tenth Amendment, noting expressly the contrary decision of the Tenth Circuit. (Pet. App. 50) The court specifically noted the DPPA requires States to administer and enforce its provisions. In recognizing the controlling authority of *Printz* and *New York*, the Eleventh Circuit rejected the argument of the United States that Congress may command State officers to assist in the implementation of federal law so long as Congress devises a legislative program that regulates States directly rather than by requiring States to regulate third parties. The Eleventh Circuit noted that the cases cited by the United States, *Garcia*, *Baker*, and *E.E.O.C. v. Wyoming*, apply only when a "particularly strong federal interest permits Congress to bring state governments within the orbit of generally applicable federal regulation." (Pet. App. 46) Thus the Eleventh Circuit focused keenly on the nexus between the cases argued by the United States and those argued by the State of Oklahoma. In the context of some significant federal interest expressed in a generally applicable statute, the sovereignty of the States may have to cede to federal authority. When, however, "the whole object of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate." Id., citing *Printz*, 117 S. Ct. at 2383.

The decisions of the Courts of Appeals are irreconcilable. The Seventh Circuit and Tenth Circuit have rejected the arguments of the States that the DPPA violates the Tenth Amendment. The Fourth Circuit and Eleventh Circuit have held the DPPA violates the Tenth Amendment. The United States has filed its petition for certiorari on the issues presented in regard to the DPPA, acknowledging that review by this Court is necessary. *See, Reno v. Condon, petition for cert. filed,* 67 U.S. L.W. 3588 (U.S. Mar. 15, 1999) (No. 98-1464).

This issue is ready for this Court's determination. All Circuits within which challenges to the DPPA were filed have now ruled. Further "percolation" of the issue is unlikely to present another appellate ruling in the foreseeable future.

II. THE CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES

The constitutional issue presented in this petition is whether Congress can regulate the States directly and exclusively as States and thereby require the States, or agencies or officers of the States, to implement, administer or enforce a federal program. This Court has recognized the great importance of Tenth Amendment questions involving the authority of Congress to regulate the affairs of the States:

> [T]he task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee,* 1 Wheat. 304, 324 (1816), the

> Court has resolved questions 'of great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

New York, 505 U.S. at 155.

This case presents issues just as important and delicate, requiring resolution by this Court. The State of Oklahoma asserts that this Court's decisions in *New York* and *Printz* expressed a clear limit upon Congress' powers to enact legislation which commandeers the States. As the Court of Appeals clearly acknowledged, Congress may not "require[ ] states either to legislate pursuant to Congress' direction, or to *implement an administrative solution*. The [Supreme Court] emphasized that a state could not decline to *administer* the program." (Pet. App. 7) (emphasis added) (citing *New York*, 505 U.S. at 176-77). The Court of Appeals likewise noted this Court's later decision in *Printz*, which "held that the forced participation of a state's executive offices in the actual *administration* of a federal program . . . was unconstitutional." (Pet. App. 8) (emphasis added) (citing *Printz*, 521 U.S. at ___, 117 S.Ct. 2384).

It being undisputed that the *Printz* holding that coerced administration is unconstitutional, the assertion of the Court of Appeals that the Supreme Court "has yet to hold that a federal law, which directly regulates state activity and necessitates some state legislative or administrative action to achieve compliance, amounts to unconstitutional 'commandeering[,]' " (Pet. App. 15) is contradictory, at best. The DPPA can be seen only as requiring States to implement and administer it. Indeed,

while the federal government retained authority to prosecute violations of the DPPA, the whole of the Act is administered by the States. States must make the determination of who may receive records permissively. States must comply with the mandatory disclosure provisions of the DPPA. States must make policy decisions as to the amount of resources to use in determining whether a person requesting information qualifies for a mandatory or permissive exception.

Furthermore, the Court of Appeals' statement that "[t]he Supreme Court has never suggested that the Tenth Amendment bars Congress from regulating state conduct merely because states are the only actors engaged in a certain activity[,]" (Pet. App. 12) does not withstand scrutiny. This Court in *Printz* struck down federal law commandeering local chief law enforcement officers ("CLEOs"). It was not disputed therein that CLEOs were executive officers of local governments. In *New York*, this Court struck down a "take title" provision regarding nuclear waste which would have affected *only* state governments. Certainly, it is implicit from *New York* and *Printz* that the Tenth Amendment prohibits direct and exclusive regulation of States by Congress.

There is no difference in the manner in which the DPPA mandates the involvement of State officers and employees in the administration of the DPPA and the manner in which the Brady Act interim provisions mandated participation of CLEOs in *Printz*. States must divert resources and personnel under the DPPA. States must accept the political burden for the substantial monetary costs to the States of the DPPA and will take the blame for the shortcomings of the Act. The federal government gets

a fiscal and political windfall. In short, prohibitions this Court propounded in *Printz* and *New York* control challenges to the DPPA.[3]

Not surprisingly, arguing before the Court of Appeals, the United States sought its support from *Garcia, E.E.O.C. v. Wyoming, Baker,* cases which saw no impermissible constitutional infringement upon state sovereignty in *laws of general applicability*.[4] Yet, the general applicability of the laws in those cases was the underpinning for upholding those laws against the States. When laws *directly* and *exclusively* regulated States as States, this Court turned away from *Garcia, E.E.O.C. v. Wyoming,* and *Baker*.

Thus, the conflict is presented. *New York* and, especially, *Printz,* speak to a fundamental reservation of sovereignty of the States, by which Congress must respect the limits imposed by the Tenth Amendment. The clarity expressed in these cases and the bases upon which each have application herein show that the DPPA is plainly

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[3] In addition, the State's determination that records maintained by the State pertaining to State activities should be available to the public is effectively repealed by operation of federal law.

[4] *Baker* held only that Congress may impose the same obligations on States that it imposed on private bond issuers and the federal government. *Garcia* held that Congress was allowed to impose the same minimum wage and overtime requirements on local transit authorities as were applied to private employers and the federal government. Similarly, *E.E.O.C. v. Wyoming* only imposed on the States the same prohibitions against age discrimination applicable to the private sector.

contrary to the limits of the Tenth Amendment. Despite sufficient direction from this Court, the Court of Appeals erred in overturning the proper ruling of the District Court.

The interest of the State in the protection of its sovereignty and its ability to remain responsive to its citizens requires that this Court hold the DPPA unconstitutional. The decision of the Tenth Circuit Court of Appeals admits additional erosion of the Tenth Amendment through which Congress may legislate at will over any area of State concern, thereby allowing the enactment of a class of laws which does nothing but directly and exclusively control State affairs. The immediate result is the displacement of important State policies. Here, the State of Oklahoma has consistently sought to protect the ability of citizens to be informed of the workings of their government. Without the DPPA the State remains fully accountable to its citizens in the release or failure to release State records. The DPPA wholly undoes that.[5] *Printz* and *New York* simply do not indicate the Constitution has changed so much or that the Court is prepared to acknowledge such a radical expansion of the powers of Congress. The State of Oklahoma seeks to determine that it may yet control records created by the sovereign powers of the State, for the use of the State, but open to the public by the constitutional and statutory mandate of the State.

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[5] The Eleventh Circuit observed that Congress "riddled the Act with more holes than Swiss cheese. Through these holes escaped most the of interstate commerce activity covered by the Act." (Pet. App. 41) Commercial interests are thereby protected from the prohibitions of the act. It is only the right of citizens to have access to government records which has been undone.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

W.A. Drew Edmondson
Attorney General

James Robert Johnson
Assistant Attorney General

John K. Lindsey
General Counsel
Department of Public Safety

Douglas F. Price
Assistant Attorney General

Office of the Attorney General
4545 North Lincoln Blvd.
Room 260
Oklahoma City, Oklahoma 73105
405/521-4274

April, 1999

STATE OF OKLAHOMA, ex rel OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

No. 97-6389.

United States Court of Appeals,

Tenth Circuit.

Dec. 3, 1998.

James Robert Johnson, Assistant Attorney General (Douglas F. Price, Assistant Attorney General, and John K. Lindsey, General Counsel, Oklahoma Department of Public Safety, with him on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Mark B. Stern (Alisa B. Klein and Daniel Kaplan with him on the brief), Appellate Staff, Civil Division, Department of Justice, Washington, D.C. for Defendant-Appellant.

Robin L. Rivett, Anne M. Hawkins, and Deborah J. La Fetra, Of Counsel, Pacific Legal Foundation, Sacramento, California, filed an Amicus Curiae Brief in Support of Plaintiff-Appellee.

Thomas H. Odom, Gregory S. Feder, and Marc R. Baluda of Arter & Hadden LLP, Washington, D.C., Bill Pryor, Attorney General, Billington M. Garrett, Assistant Attorney General, and Jack Curtis, Assistant Attorney General, Montgomery, Alabama, and William U. Hill, Attorney General, Cheyenne, Wyoming, filed an Amicus Curiae Brief in Support of Plaintiff-Appellee.

Before ANDERSON, HOLLOWAY, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

In this case, Oklahoma's open record laws and federal legislation preventing disclosure of information contained in motor vehicle records are in conflict. The Oklahoma Highway Safety Code, Okla. Stat. tit. 47, § 6-117(H), and the Oklahoma Open Records Act, Okla. Stat. tit. 51, § 24A.5, require that information about any individual identified in the records of Oklahoma's motor vehicle department be available for public inspection for a small fee. Any public official who willfully violates the state's open records policy is subject to both criminal and civil liability. *Id.* § 24A.17. In contrast, subject to certain enumerated exceptions, the Driver's Privacy Protection Act of 1994 (DPPA), Pub.L. No. 103-322, 108 Stat. 2099-2102 (effective Sept. 13, 1997) (codified at 18 U.S.C. §§ 2721-2725), prohibits a state motor vehicle department from knowingly disclosing "personal information" about any individual obtained "in connection with a motor vehicle record." 18 U.S.C. § 2721(a). The DPPA authorizes the Attorney General to assess a civil fine of up to $5,000 a day against any state motor vehicle department that "has a policy or practice of substantial noncompliance" with the DPPA. *Id.* § 2723(b). The DPPA also provides for criminal fines and civil damages against any person who knowingly violates its provisions. *Id.* §§ 2723(a) & 2724.

The state of Oklahoma filed suit challenging the DPPA on its face as an unconstitutional infringement upon state sovereignty. The question presented is whether the DPPA is a valid exercise of congressional

power to which contrary state law must yield consistent with constitutional principals of federalism and the Tenth Amendment's reservation to the States of all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X.

I.

To protect the personal privacy and safety of licensed drivers, *see* 138 Cong. Rec. H1785-01, Congress enacted the DPPA which restricts the ability of third parties to obtain personal information about individuals identified in the records of state motor vehicle departments. The first section of the DPPA provides:

> (a) **In general.** – Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

18 U.S.C. § 2721(a).[1] Subsection (b) of § 2721 requires a state to disclose personal information in limited

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[1] The DPPA defines "motor vehicle record" as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." The DPPA defines "personal information" as that which "identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(1) & (3).

situations to carry out the purposes of federal and state laws affecting motor vehicles. Subsection (b) also sets forth fourteen exceptions to subsection (a)'s general prohibition, each of which allow a state motor vehicle department, in its discretion, to disclose personal information in certain instances. *Id.* § 2721(b). Perhaps the most notable of these is exception eleven, which is an opt-out provision allowing a state to disclose an individual's motor vehicle record –

> if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

Id. § 2721(b)(11).[2]

In its complaint, the state of Oklahoma sought declaratory and injunctive relief, asking the district court to declare the DPPA unconstitutional and enjoin its enforcement. According to the state, the DPPA impairs the state's ability to manage its motor vehicle records by directing the state to regulate the disclosure of motor vehicle information in a specific manner. The state contends the DPPA unconstitutionally "commandeers" the functioning of its

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[2] The DPPA also places restrictions on the manner in which third parties may use, sell, or otherwise re-disclose personal information obtained pursuant to the DPPA's exceptions. 18 U.S.C. § 2721(c).

motor vehicle department by requiring the state to regulate a federal program. The United States defends the DPPA on the basis that it does not direct the state to regulate a federal program; rather the DPPA directly regulates the disclosure of state motor vehicle information consistent with constitutional principles of federalism and the Tenth Amendment.

The district court granted the state's requested relief and permanently enjoined the United States from enforcing the DPPA in Oklahoma. The district court held that the DPPA constituted an unconstitutional "command to state governments to implement legislation enacted by Congress." *Oklahoma v. United States*, 994 F.Supp. 1358, 1363 (W.D.Okla.1997). The court reasoned:

> The State of Oklahoma processes approximately 1 million requests for motor vehicle information annually. . . . The system set forth in the DPPA would require Oklahoma to train . . . [Oklahoma Department of Public Safety] employees and the employees in approximately 270 tag agencies across the State on when and how records may be released. Additionally, the State would be required to monitor the tag agents to ensure their compliance with the federal standards.

Id. at 1362. According to the district court, the DPPA unlawfully required the state of Oklahoma to create and maintain a system to enforce an unfunded federal mandate. *Id.* at 1363. Our jurisdiction to review the district court's judgment arises under 28 U.S.C. § 1291. We review de novo the district court's determination of the DPPA's constitutionality, *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir.1995), and reverse.

II.

In determining whether an Act of Congress is constitutional on its face, we afford the legislation great deference. *Rostker v. Goldberg*, 453 U.S. 57, 64, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). We begin with the presumption that the challenged statute is constitutional. *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We do not question the wisdom of the statute. *Id.* "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *TVA v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

Ascertaining the constitutional line between federal and state power is among the most difficult judicial tasks. The Constitution confers certain enumerated powers upon Congress. U.S. Const. Art. I. To the extent the Constitution does not divest the states of certain powers, they retain them. Thus, the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100 124, 61 S.Ct. 451, 85 L.Ed. 609 (1941). To be sure, states retain a significant amount of sovereign authority. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 549, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). How much remains uncertain. We therefore look to existing Supreme Court precedent for guidance as to the proper division between federal and state authority.

A.

To support its argument that the DPPA is unconstitutional, the state of Oklahoma relies principally on *New*

York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and *Printz v. United States*, 521 U.S. 98, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Both *New York* and *Printz* set aside Acts of Congress on Tenth Amendment grounds. The state argues that *New York* and *Printz* establish a broad prohibition against federal restrictions aimed exclusively at state activity – a prohibition which, according to the state of Oklahoma, sounds the death knell of the DPPA.

In *New York*, the Court addressed the constitutionality of the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. That provision directed state legislatures either to enact laws regulating the disposal of low level nuclear waste produced within their borders, or to take title to and possession of such waste with all its accompanying liability and problems. A state's failure to "choose" either alternative would result in the state becoming liable for all damages waste generators suffered as a result of the state's inaction. The Court held that the provision was inconsistent with the division of authority between state and federal governments because it commandeered the states' legislative process by compelling them to enact or administer a federal regulatory program. *Id.* at 174-177, 112 S.Ct. 2408. In other words, the law effectively required states either to legislate pursuant to Congress' direction, or to implement an administrative solution. The Court emphasized that a state could not decline to administer the program. No matter which alternative the state chose, it was compelled to follow Congress' mandate. *Id.* at 176-77, 112 S.Ct. 2408. The Court concluded:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. *The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation.* Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id. at 178, 112 S.Ct. 2408 (emphasis added).

Subsequent to *New York*, the Court again addressed the proper division between state and federal authority in *Printz*. *Printz* involved the constitutionality of certain interim provisions of the Brady Handgun Violence Prevention Act. Those provisions directed state and local law enforcement officials to conduct background checks and perform other tasks related to prospective handgun purchasers. Relying on historical practice, the structure of the Constitution, and its prior decisions, a sharply divided Court held that the forced participation of a state's executive officers in the actual administration of a federal program, albeit only temporarily, was unconstitutional. *Printz*, 521 U.S. at ___, 117 S.Ct. at 2384. The Court concluded:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a

> federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at 2384.

B.

The United States asserts that *New York* and *Printz* do not prohibit Congress from imposing restrictions directly on state activity; rather they only prohibit Congress from requiring states to enact or administer a federal regulatory program designed to address problems created by third parties. The United States argues that the DPPA is constitutional because it regulates state motor vehicle departments by directing them to comply with federal law. The DPPA does not require states or their agents to regulate third parties by directing states to enforce federal law. Citing *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988), the United States suggests the Tenth Amendment poses no bar to federal legislation which regulates state activity directly.

Baker addressed the constitutionality of § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which removed from federal income tax exemption interest earned on bearer bonds issued by state and local governments. The question was whether § 310(b)(1) violated the Tenth Amendment by compelling states to issue bonds in registered form. *Baker*, 485 U.S. at 507-08, 108 S.Ct. 1355. Treating § 310(b)(1) as if it directly regulated the states by prohibiting the issuance of bearer bonds, the Court rejected South Carolina's argument that the law was invalid because it commandeered the state

legislative and administrative process by requiring states to enact legislation authorizing and administering bond registration. *Id.* at 513, 108 S.Ct. 1355. The Court reasoned:

> Such 'commandeering' is . . . an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Id. at 514-15, 108 S.Ct. 1355. With this background in mind, we turn to a discussion of the DPPA.

III.

Relying on *New York* and *Printz*, a divided panel of the Fourth Circuit recently held that because the DPPA was not a "generally applicable law," "Congress did not have authority under our system of dual sovereignty to enact it." *Condon v. Reno*, 155 F.3d 453, 463 (4th Cir.1998), *petition for rehearing filed* October 16, 1998.[3] In *Condon*, the Fourth Circuit read *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), and its progeny (including Baker) to stand for the proposition, purportedly endorsed in *New York* and

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[3] On October 22, 1998, the Fourth Circuit ordered Plaintiffs Condon and South Carolina to respond to the United States' petition for rehearing with suggestion for rehearing en banc. Plaintiffs filed their response on November 3, 1998. As of today's date, the United States' petition remains pending.

Printz, that Congress may only regulate the conduct of state governments through laws of general applicability. *Condon*, 155 F.3d at 461-62 & n. 5.[4] According to the Fourth Circuit, Congress may not regulate "States as States." Rather, "Congress may only subject states to legislation that is also applicable to private parties." *Id.* at 461 (citing *New York*, 505 U.S. at 160, 112 S.Ct. 2408). Because the DPPA regulated only the disclosure of information contained in state motor vehicle records and did not regulate the disclosure of personal information contained in private databases, the DPPA, like the laws in *New York* and *Printz*, could not withstand Tenth Amendment scrutiny. *Condon* 155 F.3d at 460-63.[5]

In his dissent, Judge Phillips rejected the majority's conclusion that Congress lacks any authority to regulate

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[4] In *Garcia*, the Court overruled the "traditional governmental functions" test established in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), and held that application of the Fair Labor Standards Act to state and local governments did not unconstitutionally infringe upon state sovereignty. The Court declined, however, "to identify or define what affirmative limits the constitutional structure might impose on federal action affecting States under the Commerce Clause." *Garcia*, 469 U.S. at 556, 105 S.Ct. 1005. *See also EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (upholding application of the ADEA to the States).

[5] The question of the DPPA's constitutionality currently is pending in the Seventh and Eleventh Circuits. *Travis v. Reno*, 12 F.Supp.2d 921 (W.D.Wis.) (holding the DPPA unconstitutional), *appeal docketed*, No. 98-2881 (7th Cir., filed July 27, 1998); *Pryor v. Reno*, 998 F.Supp. 1317 (M.D.Ala.) (holding the DPPA constitutional), *appeal docketed*, No. 98-6261 (11th Cir., filed April 2, 1998).

the "States as States." *Id.* at 469 (Phillips, J., dissenting). According to Judge Phillips, the legislation at issue in *Garcia* and subsequent cases relied on by the court "was immune to Tenth Amendment challenge not so much-if at all-because it applied equally to state and private actors as because it directly regulated state activities rather than using the 'States as implements of regulation' of third parties." *Id.* at 468 (quoting *New York*, 505 U.S. at 160, 112 S.Ct. 2408). In regulating states that choose to release motor vehicle information to the public, Congress simply exercised its power of preemption by requiring states to release such information into the stream of commerce in a manner Congress deemed appropriate.

Like Judge Phillips, we do not read Supreme Court precedent as establishing a blanket rule that "Congress may only subject state governments to generally applicable law." *Condon*, 155 F.3d at 461 (internal quotations omitted). The Supreme Court has never suggested that the Tenth Amendment bars Congress from regulating state conduct merely because states are the only actors engaged in certain activity.

> Surely it is no basis for invalidating [the DPPA] . . . that no private equivalent could be found in the particular area of regulation. Would the requirements of the DPPA really be any less intrusive on state sovereignty interests if they were part of broad privacy protections involving private as well as public holders of sensitive information?

Id. at 469 (Phillips, J., dissenting).

To be sure, the Supreme Court has noted a logical distinction between generally applicable laws, which incidentally apply to states, and laws compelling States to legislate or regulate in accordance with federal law. *Printz*, 521 U.S. at ___, 117 S.Ct. 2365; *New York*, 505 U.S. at 160, 112 S.Ct. 2408. Oppressive federal regulation that "commandeers" a state's sovereign functions is less likely to arise where the law is aimed at both private and public entities. This is so because generally applicable laws are not aimed at uniquely governmental functions. Moreover, laws affecting both private and public interests are subject to stricter political monitoring by the private sector. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv.L.Rev. 2180, 2207 (1998).

The Supreme Court's "anticommandeering" approach in *New York* and *Printz* reflects a legitimate concern about federal government interference with state government functions. But the arguments against the DPPA are much less compelling than the arguments against the statutes at issue in *New York* and *Printz*. Unlike the federal statute in *New York*, the DPPA does not commandeer the state legislative process by requiring states to enact legislation regulating the disclosure of personal information from motor vehicle records. Rather, the DPPA directly regulates the disclosure of such information and preempts contrary state law. *See New York*, 505 U.S. at 178, 112 S.Ct. 2408. If states do not wish to comply with those regulations, they may stop disseminating information in their motor vehicle records to the public. In contrast, the statute in *New York* offered no such alternative to the states.

Unlike the federal statute in *Printz*, the DPPA does not conscript state officials to enforce federal law. Under the DPPA, enforcement is the job of federal officials. Unlike *New York* and *Printz*, the DPPA does not affect any unique government function, such as the state legislative process or state law enforcement activities. The dissemination of personal information into the stream of commerce can in no sense be considered uniquely governmental. *See e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681b; Video Privacy Protection Act, 18 U.S.C. § 2710. The DPPA neither limits a state's ability to regulate in the field of automobile licensing and registration, an exercise traditionally left to the states, nor restricts a state's ability to use motor vehicle information in its own regulatory activities.

Our conclusion that the DPPA differs from the statutes at issue in *New York* and *Printz* is buttressed by the Supreme Court's decision in *Baker*. The only provision of TEFRA at issue in *Baker* was § 310(b)(1), which removed the federal tax exempt status for bearer bonds issued by state and local entities. Consequently, the provision imposed a burden only on state and local governments. In upholding § 310(b)(1), *Baker* rejected the notion that the federal government may never force a state wishing to engage in certain activity to take administrative or legislative actions to comply with federal standards. 485 U.S. at 514-15, 108 S.Ct. 1355. In fact, the Court referred to federal regulation of state activity as "a commonplace that presents no constitutional defect." *Id.* at 515, 108 S.Ct. 1355.

In enacting the DPPA, Congress obviously curtailed states' prerogative to make choices respecting the release

of motor vehicle information. No one claims that Congress exceeded the scope of its power under the Commerce Clause in so doing. Nor has the Supreme Court ever suggested that Congress impermissibly invades areas reserved to the states under the Tenth Amendment because it exercises its preemptive authority under the Commerce Clause in a manner that displaces state law and policy to some extent. The DPPA simply requires states to make a choice, i.e. stop releasing personal information from state motor vehicle records to the public, or release such information consistent with the dictates of the DPPA. *See FERC v. Mississippi*, 456 U.S. 742, 767-68 n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (upholding federal legislation that gave States "a choice between regulating in conformity with federal requirements, or abandoning regulation in a given field").

While we are cognizant of the Supreme Court's trend established by *New York* and *Printz* of striking down federal legislation which "commandeers" state legislative and administrative processes, the Court has yet to hold that a federal law, which directly regulates state activity and necessitates some state legislative or administrative action to achieve compliance, amounts to unconstitutional "commandeering." If a precedent of the Supreme Court (in this case *Baker*) "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case that directly controls, leaving to . . . [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Finding the logic in *Baker* controlling, we believe that any

expansion of Tenth Amendment jurisprudence to invalidate the DPPA is best left to the Supreme Court. At this stage in Tenth Amendment jurisprudence, we find nothing that requires us to invalidate the DPPA. We hold that the DPPA constitutes a valid exercise of congressional power.[6] The judgment of the district court is

REVERSED.

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[6] Because we conclude that the DPPA does not violate the Tenth Amendment, we need not address the United States' alternative argument that the DPPA may also be upheld as a legitimate exercise of congressional power under § 5 of the Fourteenth Amendment.

Attachment A: Order and Judgment being reviewed

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, Plaintiff,	) CIV-97-1423-R
v.	) (Filed Sep. 17, 1997)
THE UNITED STATES OF AMERICA, Defendant.	)

ORDER

This matter comes before the Court on the Application for Preliminary Injunction, filed by Plaintiff, the State of Oklahoma ("Oklahoma"), ex rel. the Department of Public Safety ("DPS"). Plaintiff seeks an injunction prohibiting Defendant, the United States of America, from enforcing the Driver's Privacy Protection Act of 1994 ("DPPA" or "the Act"), P.L. 103-322, §§ 300001-300003, which was scheduled to take effect on September 13, 1997. Plaintiff contends that the Act, codified at 18 U.S.C. §§ 2721-25 is unconstitutional. On September 15, 1997, the Court issued an Order, wherein it granted Plaintiff's requested relief, noting that further elaboration would follow. This Order disposes of all matters before the Court.[1]

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[1] The parties agreed that the Court's decision with regard to the preliminary injunction should also serve as a decision on

BACKGROUND

The DPPA regulates the dissemination and use of "personal information" contained in state motor vehicle records.[2] Congress enacted the DPPA in 1994, alleging concern for a perceived national problem, the widespread availability of personal information from state motor vehicle records. Congress enacted the DPPA in part to combat the commercial practice of selling information obtained via driver's license applications and motor vehicle records. Congress also heard testimony that stalkers and other criminals have used motor vehicle information to locate their victims.

The DPPA took effect on September 13, 1997, and prohibits "a State department of motor vehicles, and any

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the merits of the action. The elements of a permanent injunction and a preliminary injunction are similar, the sole exception being that the movant must actually prevail, as opposed to showing a likelihood of success on the merits, in order to receive a permanent injunction. Therefore, the Court shall treat this as a resolution on the merits.

The Court also notes that although this is a case of first impression in both this district and this circuit, on September 11, 1997, the United States District Court for the District of South Carolina, Columbia Division, the Honorable Dennis Shedd, ruled that the DPPA violates the Tenth Amendment of the United States Constitution.

[2] Under the DPPA, " 'personal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725.

officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a).[3] This prohibition, however, is not absolute. The DPPA sets forth specific exceptions to the prohibition. When a request is made by an appropriate person for an appropriate purpose, as defined by the statute, the state may disclose personal information. 18 U.S.C. § 2721(b)(1)-(14).[4] Additionally,

> [a] State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection

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[3] The DPPA defines "motor vehicle record" as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. § 2725(1).

[4] The permissible exceptions permit disclosure for use by government agencies, for use in connection with motor vehicle safety and theft, emissions, recalls, advisories, market research activities, for use by a legitimate business to verify the accuracy of personal information submitted by employees or contractors, for use in court or administrative proceedings, for use in research, so long as not published, for use by insurers, for use in providing notice to owners of towed vehicles, for use by private investigators, so long as the intended use is also permissible, for use by employer or insurer with regard to commercial drivers' license, for use in connection with the operation of private toll facilities, for use by a requester who has the written consent of the person whose information is sought and for any use authorized by the State that holds the record, if the use relates to the operation of a vehicle or public safety.

> (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section

18 U.S.C. § 2721(d).

Prohibitions and limitations also extend to those persons who seek or receive information from state motor vehicle records. "It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title." 18 U.S.C. § 2722(a). Furthermore, "[i]t shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record." 18 U.S.C. § 2722(b).

Violation of the DPPA by either a State or Individuals carries a price. "A person who knowingly violates this chapter shall be fined under this title." 18 U.S.C. § 2723(a).[5] Civil remedies, including actual and punitive damages, as well as attorneys' fees, are available against any person who knowingly violates the Act. 18 U.S.C. § 2724. Furthermore, "[a]ny State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more

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[5] "Person" is defined by the Act as "an individual, organization or entity, but does not include a State or agency thereof." 18 U.S.C. § 2725(2).

than $5,000 a day for each day of substantial noncompliance." 18 U.S.C. § 2723(b).

Oklahoma law currently provides that motor vehicle records are public record. The Department of Public Safety is required by Okla. Stat. tit. 47 § 6-117 to retain and file every application for a license it receives. It must note whether the application is granted or denied; and if denied, the basis thereof. All suspensions and revocations of licenses must be recorded, along with the reason for such action.

> The Department of Public Safety or any motor license agent upon request shall prepare and furnish a summary to any person of the traffic record of any person subject to the provisions of the motor vehicle laws of this state. Said summary shall include the enumeration of any motor vehicle accidents, reference to convictions for violations of motor vehicle laws, and any action taken against the person's privilege to operate a motor vehicle, as shown by the files of the Department for the three (3) years preceding the date of the request.

Okla. Stat. tit. 47 § 6-117(H). Motor vehicle records are also covered by the Oklahoma Open Records Act, which requires public access and imposes criminal penalties and civil liability on those public officials and public bodies who fail to comply. Okla. Stat. tit. 51 § 24A.17. Oklahoma law conflicts, in many regards, with the DPPA.[6]

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[6] During the September 12, 1997 hearing, the United States asserted that the State of Oklahoma lacks standing to challenge the DPPA, because the DPPA does not conflict with Oklahoma law. Defendant contends that Oklahoma law does not mandate

Oklahoma challenges the constitutionality of the DPPA, arguing that it violates the Tenth Amendment, the Eleventh Amendment, and that Congress has exceeded the scope of its authority under the Commerce Clause. The Court finds that the DPPA violates that [sic] Tenth Amendment, and therefore no reason exists for the Court to consider Plaintiff's alternative arguments at this time. *See Clinton v. Jones*, 117 S.Ct. 1636, 1642 n. 11 (1997); *New York v. United States of America*, 505 U.S. 144, 184 (1992).

DISCUSSION

> Whenever called upon to judge the constitutionality of an Act of Congress – 'the gravest and most delicate duty that this Court is called upon to perform,' *Blodgett v. Holden*, 275 U.S. 142, 148 [48 S.Ct. 105, 107, 72 L.Ed. 206] (1927) (Holmes, J.) – the Court accords 'great weight to the decisions of Congress.' *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412

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the disclosure of information that must, under the terms of the DPPA, remain confidential. The Court notes, however, that based on the testimony of Bill Bruce, that the disclosure of certain items, such as drivers' license applications, would result in the disclosure of a person's address, which is personal information protected by the DPPA. Additionally, revealing a motor vehicle record, which can be obtained by providing a person's name and date of birth, would result in violation of the DPPA, because the person's driver's license number would be revealed. In some instances revealing the driver's license number is also revelation of the person's social security number, as often they are one in the same. Either way, the DPPA would be violated. The United States' argument that Oklahoma law does not directly conflict with the DPPA is without merit; and the Court finds that the State has standing to pursue this action.

> U.S. 94, 102 [93 S.Ct. 2080, 2086, 36 L.Ed.2d 772] (1973). The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 [71 S.Ct. 624, 644, 95 L.Ed. 817] (1951) (concurring opinion), "we must have due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."

Rostker v. Goldberg, 453 U.S. 57, 64, 101 S.Ct. 2646, 2651, 69 L.Ed.2d 478 (1981). Loyal to this obligation, the Court presumes that the challenged statute is valid. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).

The State of Oklahoma contends that Congress has exceeded its authority and thereby violated the Tenth Amendment in enacting the DPPA, because the Act mandates that States invoke a federal regulatory scheme with regard to their own records.[7] The State relies on two opinions of the Supreme Court in support of its arguments, *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 120 (1992) and *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). In both of these cases, the Supreme Court held statutes unconstitutional as violative of the Tenth Amendment.

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[7] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The United States contends that these cases are inapplicable, and steers the Court toward three other Supreme Court cases, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *South Carolina v. Baker*, 485 U.S. 505 (1988); and *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983). The United States argues that the Act does not violate the principles of dual sovereignty, but rather than the Act is mere direct regulation of those States that choose to disseminate personal information. Expectedly, the State contends that these cases are inapposite and not controlling. The Court concurs with the State and finds that *New York* and *Printz* are controlling.

In *New York*, the Supreme Court considered the constitutionality of Congressional regulation of radioactive waste, undertaken in certain provisions of the Low-Level Radioactive Waste Policy Amendments of 1985. The Court agreed that Congress possessed the authority under the Commerce Clause[8] to regulate the interstate waste disposal market; however, the Court found that the manner chosen for such regulation exceeded congressional authority under the Tenth Amendment. The Court found that Congress impermissibly sought to use States as implements of regulation.

"No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *Id.* at 178. After examining its prior cases involving federal encouragement of state action, including *FERC v. Mississippi*, 456

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[8] The Commerce Clause provides that Congress has the power "[t]o regulate Commerce . . . among the several States." Art. I., § 8, cl. 3.

U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the Court held that a particular provision in the law under consideration was unconstitutional, because it attempted to employ the state government as a federal regulatory agency. The law did not merely provide encouragement, it mandated, by providing a Hobson's choice, that State's participate in the federal regulatory scheme.[9] The same can be said here.

The Supreme Court relied in large part on the intent of the Framers of the Constitution, who chose a system by which "Congress would exercise its legislative authority directly over individuals rather than over States." *Id.*, at 165. "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to

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[9] The Court ruled that the "take title" provision of the act was unconstitutional under the Tenth Amendment, and noted the following.

> The take title provision offers state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress. . . . Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. . . . A choice between two unconstitutionally coercive regulatory techniques is no choice at all.

Id., at 175-76.

require or to prohibit those acts." *Id.* Congress may encourage States to regulate in a particular manner and may offer incentives to do so; however, it may not coerce States.

The Court continued by noting that Congress has authority under the Commerce Clause to regulate private activity and may offer States the choice of regulating according to federal standards or having their lesser standards preempted. This authority allowed Congress to enact legislation such as the Clean Water Act, 33 U.S.C. §§ 1251-1387, the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987. *Id.* at 168. The Court explained that Congress may regulate in this manner, because States are left with a choice as to whether or not they will comply by enacting their own regulations, based on Federal standards, or whether their less stringent regulations will be trumped. However, under the DPPA, States are not given any choice. They must comply or face fines from the Attorney General.

The DPPA requires both that States comply with the confidentiality requirements, and that States put in place methods for ensuring that information is not provided improperly. The only method for avoiding the administrative entanglement created by the DPPA, is to "opt-out" under § 2721(b)(11) and (b)(12), both of which require that the State ensure that every person applying for or renewing a license or title registration be given the opportunity to prevent disclosure of personal information. The State of Oklahoma processes approximately 1 million requests for motor vehicle information annually, and few of these requests, if any, are for bulk information.

The system set forth in the DPPA would require Oklahoma to train DPS employees and the employees in approximately 270 tag agencies across the State on when and how records may be released. Additionally, the State would be required to monitor the tag agents to ensure their compliance with the federal standards.

Unlike the cases cited by the United States, the DPPA is not a law of general applicability, such as the Fair Labor Standards Act, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Tax Equity and Fiscal Responsibility Act of 1982, *South Carolina v. Baker*, 485 U.S. 505 (1988), or the Age Discrimination in Employment Act, *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983). The United States argues that the law applies to both States and to persons receiving information from motor vehicle records, and therefore, the law is one of general applicability. However, even cursory review of the statute indicates that it is directed at States. The first sentence states that the Act applies to "a State department of motor vehicles, and any officer, employee, or contractor thereof." Although the law also prevents individuals from disseminating information received from the State, the law is directed not at the individuals, but at the State.

The DPPA is, like the statutory provision at issue in *New York*, "a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.*, at 176. The options given to States under the DPPA are not truly options. "A State may not decline to administer the Federal Program. No matter which path the State chooses, it must first follow the direction of Congress."

As noted by the State of Oklahoma, the Department of Public Safety Employees and the tag agents authorized by the State of Oklahoma are, under the DPPA, conscripted by the federal government for purposes of enacting the DPPA. As shown in *New York*, this is impermissible. *Id.* at 178.

The State of Oklahoma also relies on *Printz*, wherein the Supreme Court held that certain provisions of the "Brady Act," directed at handgun control, exceeded Congress' authority under the Tenth Amendment. The "Brady Act" temporarily required the chief law enforcement officer ("CLEO") of certain locales to assist in the processing of permits for gun ownership. Upon receipt of a "Brady form," CLEOs were required to make efforts to determine whether the proposed sale was lawful.

The Court again turned to its history and the Framers for consideration of the interplay between the dual sovereignties of Federal and State government. The Court concluded, as it had in *New York*, that "[t]he Federal Government may not compel the States to implement, by legislation or *by executive action*, federal regulatory programs. *Id.*, at 2380 (emphasis added).

In *Printz*, the United States argued that it was permissible for Congress to command state officials to assist in implementing federal law, so long as Congress does not compel States to make laws in their sovereign capacities. *Id.* The Supreme Court rejected the argument, as does this Court. "The federal Government may neither issue directives requiring States to address particular problems, nor command the States' officers, or those of their political subdivisions to administer or enforce a

federal regulatory program." *Id.* at 2384. This, however, is exactly what the DPPA attempts to do. It requires State motor vehicle agencies to create and maintain systems to enforce the federal law of non-disclosure. The DPPA falls squarely within the prohibitions of *Printz*.

The United States argues that the DPPA merely requires that States conform their conduct to federal standards. States are, under the DPPA, not required to enact any legislation in order to comply. However, the States are required to create and implement systems whereby those persons seeking information for a proper purpose, as defined by the Federal statute, are permitted access. The statutory scheme does not allow States any other manner of compliance and prevents, in many cases, the dissemination of personal information.

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several states a residuary and inviolable sovereignty.'

New York, 505 U.S. at 188 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)). The DPPA however, seeks to treat the Oklahoma Department of Public Safety as a subdivision of the United States. The Act, focusing on information gathered by the State, from its citizens, seeks to dictate when and to whom information may be released. The law is not one of general applicability and it

is not a permissible undertaking given the limitations imposed on Congress by the Tenth Amendment.

In enacting the DPPA, Congress exceeded its limits under the Tenth Amendment. The power that Congress sought to exercise by dictating when and how States may disclose personal information from driver's license records is a power "not delegated to the United States by the Constitution, nor prohibited by it to the States, [and such power is therefore] reserved to the States." U.S. Const. amend. X. Accordingly, the Act is unconstitutional.

As noted throughout this Order, the State has established that if the United States is not enjoined from enforcing this law, that it will suffer irreparable harm. A fine of $5,000 per day may be imposed by the Attorney General if the State has a policy of releasing information that is not in substantial compliance with the DPPA. The State has established that its laws conflict with the DPPA, and that following its own law would likely result in imposition of the fine. Given that approximately 95,000 records are disseminated from over 270 sites across the state each month, the harm that Oklahoma would suffer without an injunction is great. The United States presented no evidence to rebut the testimony of Bill Bruce, and the Court finds that Oklahoma is entitled to an injunction on this basis.

The sole remaining elements are whether the injunction would substantially injure the United States, and whether the public interest would be furthered by the imposition of an injunction. *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshore River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (citing *Lundgrin v. Claytor*, 619

F.2d 61, 63 (10th Cir. 1980)). In responding to the Application, Defendant does not contradict the State's assertions that the United States will not be injured by the imposition of any injunction. It contends, however, that Oklahoma fails to establish that the public interest will be furthered by imposition of an injunction. Defendant argues that in light of the testimony presented to Congress that murderers and other criminals use motor vehicle records to locate victims, that the public interest will be negatively impacted by imposition of an injunction. The Court finds, however, that the public interest in the sovereignty of the State and in access to records under Oklahoma statute will be served by imposition of an injunction.

CONCLUSION

For the reasons stated herein, the Court finds that the DPPA violates the Tenth Amendment of the United States Constitution, as it exceeds the scope of Congress' authority. Accordingly, Plaintiff's request for permanent injunctive relief is hereby GRANTED.

It is so ordered this 17th day of September, 1997.

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	CIV-97-1423-R (Filed Sep. 17, 1997)

JUDGMENT

Judgment is hereby entered in favor of Plaintiff.

It is so ordered this 17th day of September, 1997.

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES
DISTRICT JUDGE

ENTERED ON JUDGMENT
DOCKET ON 9-17-97

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel Oklahoma Department of Public Safety,	)	
Plaintiff-Appellee,	)	No. 97-6389
v.	)	(D.C. No. CIV-97-1423-R) (W.D. Okla.)
UNITED STATES OF AMERICA,	)	
Defendant-Appellant.	)	

ORDER ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Filed Feb. 2, 1999)

Before ANDERSON, HALLOWAY, and BALDOCK, Circuit Judges.

Before the court is Plaintiff State of Oklahoma's Petition for Rehearing and Suggestion for Rehearing En Banc. Also before the court is the Unopposed Motion of Amici Curiae, The States of Alabama And Wyoming, And Better Government Bureau, Inc., For Leave To File A Memorandum In Support Of Petition For Rehearing And Suggestion For Rehearing En Banc.

Upon due consideration, the Motion of Amici Curiae, the States of Alabama and Wyoming, and Better Government Bureau is ALLOWED. Upon further consideration of Plaintiff's Petition and the Memorandum of Amici

Curiae, Plaintiff State of Oklahoma's Petition for Rehearing is DENIED.

In accordance with Fed. R. App. P. 35(b), the clerk transmitted Plaintiff's Suggestion for Rehearing En Banc to all the judges of the court in regular active service. No member of the panel and no judge in regular active service having requested a poll on the suggestion for rehearing en banc, Plaintiff's suggestion for rehearing en banc is DENIED.

SO ORDERED.

Entered for the Court,

Bobby R. Baldock
Circuit Judge

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
U.S. COURT OF APPEALS

No. 98-6261

D.C. Docket No. CV-97-D-1396-N

BILL PRYOR, Attorney General
for the State of Alabama,
STATE OF ALABAMA,

Plaintiffs-Appellants,

versus

JANET RENO, Attorney General
of the United States, UNITED
STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

(Filed April 6, 1999)

Before TJOFLAT, Circuit Judge, GODBOLD and HILL, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Plaintiffs, Bill Pryor, Attorney General for the State of Alabama, and the State of Alabama (referred to collectively as Alabama or "the State"), sought a declaratory judgment that the Driver's Privacy Protection Act of

1994, 18 U.S.C. §§ 2721-25, is unconstitutional under both the Tenth and Eleventh Amendments to the United States Constitution, and an injunction prohibiting the defendants Janet Reno and the United States from enforcing the Act in whole or in part. The district court entered summary judgment for the United States, from which Alabama appeals.

I.

The Driver's Privacy and Protection Act of 1994 ("DPPA" or "the Act"), 18 U.S.C. §§ 2721, et seq., regulates the sale, dissemination and use by the State and private individuals of personal information[1] contained in the State's motor vehicle records.[2] The Act prohibits "a State department of motor vehicles, and any officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual

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[1] Section 2725(3) of the act defines personal information as:

> information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accident, driving violations, and driver's status.

[2] Section 2725(1) of the Act defines a "motor vehicle record" as:

> any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles.

obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a). It makes it unlawful for a State department of motor vehicles [DMV], and any officer, employee, or contractor thereof, to knowingly disclose or otherwise make available personal DMV information for any purpose other than a "permissible use." 18 U.S.C. § 2721(b). State departments of motor vehicles with a "policy or practice of substantial noncompliance" with the Act's provisions are subject to a civil penalty of up to $5,000 a day for each day of substantial noncompliance, to be imposed by the United States Attorney General. 18 U.S.C. § 2723(b). Persons who knowingly violate the Act are subject to criminal fines. 18 U.S.C. § 2723(a).

Reversing course, the Act then allows disclosure of personal information in abundant circumstances. 18 U.S.C. § 2721(b). For example, the Act *requires* that such information be disclosed for use in matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act, the Clean Air Act, and chapters 301, 305, and 321-331 of title 49. 18 U.S.C. § 2721(b) (citations omitted). It further provides that personal information *may* be disclosed for use by any government agency in carrying out its functions, *id.* § 2721(b)(1); in connection with car or driver safety, theft and other motor-vehicle related matters, *id.* § 2721(b)(2);

for use in the normal course of business by a legitimate business in certain instances, *id.* 2721(b)(3); for use in connection with any civil, criminal, administrative or arbitral proceedings in any Federal, State, or local court or agency or before any self-regulatory body, *id.* § 2721(b)(4); for use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals, *id.* § 2721(b)(5); for use by an insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, anti-fraud activities, rating or underwriting, *id.* § 2721(b)(6); for use in providing notice to owners of towed or impounded vehicles, *id.* § 2721(b)(7); for use by a licensed private investigative agency or licensed security service for any purpose permitted under the Act, *id.* § 2721(b)(8); for use by an employer or its agent or insurer to obtain or verify required information relating to a holder of a commercial driver's license, *id.* § 27221(b)(9); and for use in connection with the operation of private toll transportation facilities, *id.* § 2721(b)(10).

The DPPA also regulates private individuals' sale or disclosure of the above information. The Act prohibits authorized recipients of personal DMV information from reselling or redisclosing personal information for a use which the State could not have disclosed it in the first place. 18 U.S.C. § 2721(c); 18 U.S.C. § 2722(a). The Act requires that individuals reselling or redisclosing personal information for a permissible use keep records for five years stating to whom they have resold or redisclosed the information and the purpose of any such

release, and must make these records available to the state department of motor vehicles upon request. 18 U.S.C. § 2721(c). The Act also bars any person from knowingly obtaining personal DMV information for any unauthorized use, 18 U.S.C. § 2722(a), and from obtaining personal information "by false representation," 18 U.S.C. § 2722(b). Individuals who knowingly violate these provisions are subject to criminal fines, 18 U.S.C. § 2723(a), and private rights of action by the person to whom the personal information pertains. 18 U.S.C. § 2724.

In addition to the exceptions noted above, the Act allows States to establish waiver procedures to handle requests for disclosures that do not fall within these exceptions. 18 U.S.C. § 2721(d). The DPPA allows States to release personal information for any use not included in the Act's list of permissible uses, if the motor vehicle department provides individuals an opportunity to prohibit such disclosure. 18 U.S.C. § 2721(b)(11). Also, departments of motor vehicles are permitted to release personal information for "bulk distribution" for surveys, marketing or solicitations if individuals have an opportunity to prohibit such disclosures. 18 U.S.C. § 2721(b)(12).

Alabama contends that Congress exceeded its authority under the Tenth and Eleventh Amendments when it enacted the DPPA. The State contends that the DPPA is an unconstitutional federal directive requiring it to administer a federal program in violation of the Tenth Amendment. The State further contends that the penalties imposed by the Act for noncompliance violate the Eleventh Amendment. The United States counters that the Act is a constitutional exercise of Congress' power under the

Commerce Clause of the United States Constitution to regulate and control the dissemination of personal information in state DMV records in order to protect the privacy and safety of individuals. On cross-motions for summary judgment,[3] the district court held that the Act is a valid exercise of Congress' authority to regulate interstate commerce, and that it violates neither the Tenth nor the Eleventh Amendment. Alabama appeals from the entry of this judgment.

II.

Alabama asserts that the DPPA violates the Tenth Amendment in two ways. First, Alabama contends that the Commerce Clause does not authorize Congress to invade the Tenth Amendment by regulating the States' dissemination of motor vehicle information. Second, Alabama contends that the Tenth Amendment prohibits Congress from requiring it to administer a federal program.

1. Congress' Authority to Enact the DPPA

Alabama argues that Congress exceeded its authority in regulating the States' release of motor vehicle information because the dissemination of this information is neither commerce, nor an activity substantially affecting commerce. Although it is abundantly clear that trafficking in data bases is an activity that substantially affects

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[3] The United States' motion was for dismissal which the district court construed as a motion for summary judgment pursuant to Rule 12(b), Fed.R.Civ.P.

interstate commerce these days, we are, nonetheless, sympathetic to this argument. Congress drew its authority to regulate this activity from its nexus to interstate commerce, and then proceeded to exempt from the reach of the Act virtually all its interstate connections.

It is clear that Congress sought by this Act to protect the public from "stalkers" who might use motor vehicle information to locate their victims.[4] In trying to protect legitimate governmental and business uses of such information, however, Congress riddled the Act with more holes than Swiss cheese. Through these holes escaped most of the interstate commerce activity covered by the Act. Thus, Congress claims its authority to regulate the States' dissemination of personal DMV information lies in its power to regulate the commercial aspect of this information which it then proceeded to exclude from the Act.

We shall not resolve this troublesome issue, however, because we are persuaded that even if there is a sufficient connection between this legislation and interstate commerce to authorize Congress to enact the DPPA, the Act violates the Tenth Amendment.

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[4] During floor debate on the Senate version of the Act, Senators invoked the example of Rebecca Shaeffer, an actress from California, who was murdered by an obsessed fan who obtained her address from the department of motor vehicles through a private investigator. *See* 139 Cong.Rec. S15,766, Comments of Senator Harkin. *See also* (Feb. 4, 1994) (statement of Rep. Moran); 139 Cong.Rec. S15, 762 (Nov. 16, 1993) (statement of Sen. Boxer); 139 Cong.Rec. S15, 765 (Nov. 16, 1993) (statement of Sen. Robb); 139 Cong. Rec. S15, 765 (statement of Sen. Biden).

2. The DPPA and the Tenth Amendment

The Supreme Court has recently made clear that the federal government may not command the States to administer or enforce a federal regulatory program. *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 2384 (1997); *New York v. United States*, 505 U.S. 144, 176-77, 112 S. Ct. 2408 (1992). In *New York*, the Supreme Court addressed the constitutionality of the Low-Level Radioactive Waste Policy Act which required States to choose between accepting ownership of radioactive waste generated within their borders and regulating this waste according to instructions from Congress. 505 U.S. at 152. The Court found that this provision "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," in violation of the Tenth Amendment. *Id.* at 176. In *Printz*, the Court extended the holding of *New York* to recognize that the Tenth Amendment protects state officers, as well as States, from federal commandeering. In *Printz*, the Court held unconstitutional provisions of the Brady Handgun Violence Prevention Act which imposed interim requirements on State chief law enforcement officers ("CLEOs") to conduct background checks on prospective handgun purchasers and to perform related tasks. 117 S. Ct. at 2368. The Act required CLEOs to:

> make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a firearm by a particular purchaser] would be in violation of the law, including research in whatever state and local record keeping systems are available.

Id. at 2369 (quoting 18 U.S.C. § 922(s)(2)). The Court characterized this provision as one directing or forcing state law enforcement officers to participate in the administration of a federally enacted regulatory scheme. *Id.* at 2369, 2376. The Court held the requirement violated the Tenth Amendment because:

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at 2384.

Although *New York* and *Printz* make clear that federal law may not direct state officials to administer or enforce a federal regulatory scheme, they are less helpful in identifying the attributes of such a law. We recognize that the DPPA does not compel Alabama to enact legislation as in *New York*; nor does it conscript state officers to help the federal government search for potential violations of federal law as in *Printz*.

Nevertheless, the DPPA does establish a detailed set of rules under which Alabama's disclosure or refusal to disclose to third parties the personal information in its motor vehicle records shall be done as the federal establishment wishes it to be done. The Act *requires* that department of motor vehicle officers disclose personal information contained in its motor vehicle records for use

in connection with matters of motor vehicle or driver safety and theft and to carry out various federal statutes.[5] It further provides that personal information *may* be disclosed in fourteen other circumstances. It seeks to regulate the circumstances under which private individuals may obtain this information and to prevent the disclosure at all in certain instances. No one disputes that Congress, through the DPPA, has enacted a federal regulatory program to control the dissemination and cloaking of the States' motor vehicle information.

Furthermore, the Act is neither self-administering nor self-enforcing. State officers are *directed* to administer and enforce these rules. They must insure that protected information is disclosed only for the designated purposes specified by the federal rules. In complying with the Act, state officers must review requests for information to determine whether the request is for a permissible use. The Act contains no explicit instructions regarding the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information. In reviewing requests and interpreting the rules, state officers will be acting as federal agents making federal policy. *See Printz*, 117 S. Ct. at 2380-81.

Thus, we conclude the DPPA is a federal regulatory program which Congress has directed state officers to administer. Congress may not enlist state officers in this

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[5] This requirement nullifies the United States' argument that the Act does not command the States to do anything because the States may simply opt out of this legislation by deciding to close their DMV records completely.

way. *Printz*, 117 S. Ct. at 2380. As the Court stated in *New York*:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart.

505 U.S. at 188.

The United States argues that it is permissible for Congress to command state officers to assist in the implementation of federal law so long as Congress itself devises a clear legislative program that regulates the States directly rather than requiring them to regulate third parties. The DPPA, it is said, is constitutional because it directly regulates state activities and neither directs the States or their officials to regulate their citizens, nor to construct any regulatory regime.

We disagree. To be sure, Congress may require the States to comply with federal regulation of an activity affecting interstate commerce when the States choose to engage in that activity.[6] Thus, the States as employers must comply with the federal minimum wage law. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528

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[6] In fact, Congress may totally occupy a field of regulation of interstate commerce but permit continued state regulation of the activity so long as a State meets certain preconditions. The DPPA does not, however, preempt the field of licensing drivers. Nor does it impose preconditions to the States' continued regulation of a totally preempted field. It seeks only to direct the States in that regulation.

(1985). *See also South Carolina v. Baker,* 485 U.S. 505, 511-15 (1988) (States may be required to issue bonds in registered form as are private corporations); *United Transp. Union v. Long Island R. Co.,* 455 U.S. 678 (1982) (labor laws apply to state-owned railroads); *Fry v. United States,* 421 U.S. 542 (1975) (States are bound by generally applicable wage and price controls).

But all of these cases are examples of when a particularly strong federal interest permits Congress to bring state governments within the orbit of generally applicable federal regulation. *Garcia,* 469 U.S. at 554 ("San Antonio faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet"). In *Printz* and *New York,* the Supreme Court distinguished such laws of general applicability from laws targeted exclusively at States. 117 S. Ct. at 2383; 505 U.S. at 160. Although the Tenth Amendment does not automatically permit the former and proscribe the latter, in the cases cited above the issue was whether the incidental application to the States of federal laws of general applicability excessively interfered with the functioning of state governments. The federal laws at issue were upheld because the federal interest was strong enough to permit Congress to bring state governments within the orbit of generally applicable federal regulation.

The Court has made clear, however, that where, as here, the "whole object of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate." 117 S. Ct. at 2383. *See also New York,* 505 U.S. at 160 (radioactive waste statute

unconstitutional because the "[take title] provision is inconsistent with the federal structure of our Government established by the Constitution"). Instead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of the States' own property – the motor vehicle records. "It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." *Printz*, 117 S.Ct. at 2383.[7]

It is not state power that the principle of state sovereignty protects. When States are forced to administer federal programs, a fundamental attribute of State sovereignty is threatened: democratic accountability. It is this basic principle upon which the Supreme Court rested its holdings in *New York* and *Printz*:

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[7] The United States suggests that the DPPA is generally applicable when considered in the context of other federal laws which regulate the dissemination of personal information, such as the Video Privacy Protection Act, 18 U.S.C. § 2710 (restricting disclosure of personal information contained in video rental records) and the Cable Communications Policy Act, 47 U.S.C. § 551 (restricting disclosure of personal information about cable subscribers). Even if a statute could be considered generally applicable because it is part of some sort of scheme of regulation, Congress has thus far regulated the disclosure of personal information by holders of databases only in a piecemeal fashion. There is no generally applicable Congressional regulation of the disclosure of such information even if all such laws are considered part of such a scheme. Thus, there is no generally applicable Congressional regulation of this activity of which the DPPA is a part.

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . . Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

117 S.Ct. 2365. The Court also observed in *New York*:

> But where the Federal Government directs the States to regulate, it may be state officials who will be the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

505 U.S. at 169 (citations omitted). Thus, when Congress requires the States to administer a federal program, democratic accountability is diminished and for this reason the Tenth Amendment is offended.

This Act cannot be saved by the argument that it simply regulates a realm of national economic activity – the buying and selling of personal information – whether or not the economic actors happen to be State or citizens.[8] The DPPA is not a law of general applicability.[9] Only States collect driver's license and motor vehicle information. This is an exercise of sovereignty. *See Peel v. Florida Dept. of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment"); *United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) ("[T]here is little question that

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[8] A similar argument was made in *Printz* that the burden on officers of the state would be permissible if a similar burden were also imposed on private parties with access to relevant data. The Court rejected this argument by noting:

> The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigations in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.

117 S.Ct. at 2383.

[9] Although the Act restricts the way in which private parties who obtain personal information from a motor vehicle department may resell or redisclose such information, the Act's applicability to private parties is incidental to its foremost purpose: regulating the way in which state disseminate information collected by their motor vehicle divisions.

the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens' ").

Thus, we conclude that the DPPA is a federal program which Congress has commanded the States to administer. As such, it offends the Tenth Amendment.[10] *Accord Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998). *But see Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998); *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998).

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[10] We find no merit in the United States' contention that the Act is a valid exercise of Congress' power to enforce the Fourteenth Amendment. U.S. Const. amend. XIV, §§ 1, 5. Whether Congress properly exercised its power under Section 5 in enacting the DPPA depends upon whether the Act enforces some right guaranteed by the Fourteenth Amendment. According to the United States, we have held that there is a "right to confidentiality" in the sort of personal information protected by the DPPA. We disagree. For example, in one of the cases cited by the United States, *James v. City of Douglas*, 941 F.2d 1539, 1544 (11th Cir. 1991), we acknowledged a constitutional right to privacy only for *intimate personal information given to a state official in confidence*. Because information contained in motor vehicle records is not this sort of information, an individual does not have a reasonable expectation that the information is confidential. Thus, there is no constitutional right to privacy in motor vehicle record information which the DPPA enforces.

We do not reach the Eleventh Amendment issue involving the constitutionality of the fines provided for by the DPPA because we hold the Act unconstitutional under the Tenth Amendment.

III.

The judgment of the district court is hereby REVERSED, and the case is REMANDED. The district court shall grant Alabama's motion for an injunction against the enforcement of the DPPA.

Title 18 U.S.C. Sec. 2721 provides:

Sec. 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In General. – Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) Permissible Uses. – Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor

vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only –

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims

investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has implemented methods and procedures to ensure that –

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and

solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or Redisclosure. – An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or or [sic] redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver Procedures. – A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy

of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

Title 18 U.S.C. Sec. 2722 provides:

(a) Procurement for Unlawful Purpose. – It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False Representation. – It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

Title 18 U.S.C. Sec. 2723 provides:

(a) Criminal Fine. – A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State Department of Motor Vehicles. – Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

Title 18 U.S.C. Sec. 2724 provides:

(a) Cause of Action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the

information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

Title 18 U.S.C. Sec. 2725 provides:

In this chapter –

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity agency thereof; and

(3) "personal, but does not include a State or information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.